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IN THE

Supreme Court of the United States

October Term, 1958

No. 783

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Petitioners,

v.

T. V. WILLIAMS, REVENUE COMMISSIONER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

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October Term, 1958

No. .....

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Petitioners,

v.

T. V. WILLIAMS, Revenue Commissioner,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia denying petition for writ of certiorari to the Court of Appeals of the State of Georgia, herein. The judgment of the Court of Appeals was entered on June 23, 1958. Rehearing was denied by the Court of Appeals on July 31, 1958. Petition for writ of certiorari was denied by the Supreme Court of Georgia on October 15, 1958. Rehearing was denied by the Supreme Court of Georgia on November 7, 1958. Application for extension of time to file petition for writ of certiorari was granted by Mr. Justice Black on January 28, 1959 to and including March 7, 1959. Further extension of time to file petition for writ of certiorari was granted by Mr. Justice Black extending the time to and including March 21, 1959.

Citations to Opinions Below

The opinion of the Court of Appeals of the State of Georgia dismissing the writ of error herein is reported at 98 Ga. App. 74, 104 S. E. 2d 923 (1958). The opinion of the Court of Appeals of the State of Georgia in an earlier aspect of this case in which a petition for writ of mandamus was sought to require the trial judge to certify the Bill of Exceptions is reported at 96 Ga. App. 685, 101 S. E. 2d 609 (1957). These opinions appear in the Appendix herein at pages 33 and 42 respectively. The Supreme Court of Georgia wrote no opinions in the case.

Jurisdiction

The judgments below were entered on dates indicated above. The jurisdiction of this Court is invoked under 28 U. S. C., § 1257, petitioners having asserted rights, privileges and immunities claimed under the Fourteenth Amendment to the United States Constitution. The rights asserted herein were raised by motions to dismiss (* Br. 50-62). Responses on rule to show cause why petitioner should not have been found in contempt (Br. 64-96), Bill of Exceptions (Br. 3) and Petition for Writ of Certiorari (Tr. C).

In each instance, as indicated by the judgment of the trial judge (Br. 99) and the opinions of the Court of Appeals (App. 33, 42)as well as the denial of certiorari by the Georgia Supreme Court (Br. 47) these claims were rejected.

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* Br.—Brief of Evidence.
Tr.—Complete Transcript of the Record.
Tr. C.—Transcript on Certiorari in Supreme Court of Georgia.

Question Presented

Whether where petitioner, a New York corporation, engaged in asserting the constitutional rights of Negroes to be free from racial discrimination, has been adjudicated guilty of contempt and fined $25,000 for the failure of a local branch officer to produce all of its records dating back for seven years, while petitioner's actual agent was not found guilty of such a contempt charge because she produced all records which in good faith she believed were demanded, petitioner may be barred from asserting its Fourteenth Amendment rights on the ground that it failed to comply with state appellate procedure although a fair reading of the law indicates that it did so comply.

Statutes Involved

The Georgia statutes involved are those which relate to the method of taking appeals to the Georgia appellate courts: §§ 6-701, 6-801, 6-802, 6-803, 6-803.1, 6-806, 6-807, 6-808, 6-813, 6-901, 6-909, 6-910, 6-1303, 6-1304, 6-1306, 6-1307, 6-1309, 6-1401. They are set forth in the Appendix, pages 45-53.

Statement

Following the ouster of the National Association for the Advancement of Colored People (NAACP) from the State of Alabama (Br. 404),[1] the NAACP moved its Southeast Regional Office, directed by Mrs. Ruby Hurley, from Birmingham, Alabama, to 859½ Hunter Street, N. W., Atlanta, Georgia on about October 1, 1956 (Br. 429). On the morning of November 21, 1956 agents of the Georgia State Revenue Department delivered to Mrs. Hurley and to officers of the Atlanta Branch of the NAACP, letters

[1] See *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449 (1958).

demanding that the addressees, including the National Association for the Advancement of Colored People, a New York corporation, produce all of the financial records and documents bearing upon the association's income and disbursements (Br. 28). The letter recited that the "records of the State Department of Revenue, Income Tax Unit, do not disclose an income tax return having been filed for the year 1955 or any year prior thereto" (Br. 28). It stated:

> Wherefore, in order to prepare the delinquent returns for the year 1955 and for the years prior thereto during which subject taxpayer has been engaged in business in the State of Georgia, demand is herewith made for immediate production of all books, records, and other data bearing on taxpayer's income, disbursements and expenses prepared or used by said corporation in the conduct of its business during the taxable years 1947 through 1955 (Br. 30).

The letter continued, that if the corporation considered itself to be exempt from Georgia income tax it was nevertheless required to file specified detailed information concerning its income and operations (Br. 31).

Upon receipt of this letter at her residence Mrs. Hurley proceeded to her regional headquarters accompanied by Georgia Revenue agents and, in the words of the trial court's judgment " . . . she permitted the duly authorized agents of said Revenue Commissioner to inspect the Georgia file of said corporation then and there in her immediate individual possession and control, which said respondent [defendant] in good faith believed to be the only books, records or data called for in said order, . . . " (Br. 106).

Mrs. Hurley, however, was not completely exonerated, for as the court held " . . . the said order, however, was not so limited, and the Court directs said respondent [defendant] Mrs. Ruby Hurley to produce all books, records and other data of said corporation kept, located or stored

at said 859½ Hunter Street, N. W., Atlanta, Fulton County, Georgia, for the inspection of T. V. Williams, Revenue Commissioner of Georgia, or any of his duly authorized agents, between the hours of 9:00 A. M. and 5:00 P. M., Atlanta time, on Tuesday, December 18, 1956, at said 859½ Hunter Street, and said corporation is likewise so ordered . . . " (Br. 106).[2]

John C. Calhoun, the branch president was not in when the revenue agents first arrived at 204 Auburn Avenue, N. E., the office of the Atlanta Branch, NAACP, (Br. 132), and the only person then served was V. W. Hodges, Chairman of the Executive Committee (Br. 132).[3] At this time, however, he went to seek Calhoun (Br. 133) who was teaching a class at a school of accounting (Br. 312). Calhoun, (at around 10:30 A. M. (Br. 442)), accompanied by counsel (Br. 135), went to the Branch Office (Br. 312), arriving within forty-five minutes of the time Hodges set out. The revenue agents had been followed by many newspaper men and Calhoun asked that they be excused (Br. 315). Upon reading the letter, Calhoun and his counsel retired to confer, and within twenty minutes returned to state that they would file a return (Br. 136) or application for exemption (Br. 150). Returns had been demanded for the years 1947-1955 and there was some discussion between Calhoun and his counsel concerning how long it would take to prepare such documents (Br. 139)—Calhoun saying the returns could be filed that day, and counsel stating that it would take longer (Br. 139-140, 316). A revenue agent testified that at that time Calhoun and counsel stated that they would not make the books and records available that day (Br. 146), but did not say that the books and records

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[2] There has been compliance with this directive; however, no final disposition has been made by the court.

[3] Hodges, as the trial court found, was not shown to have had possession or control of the books, records or other data which was requested and he was ultimately discharged (Br. 105).

could have been produced that day (Br. 150). By about 1:00 P. M. (Br. 442), and within 30 minutes after the conversation with the revenue people (Br. 436) the agent who had presented the demand letter, returned with the sheriff (Br. 147), who bore with him the following court order (Br. 38):

> It APPEARING to the Court that by his affidavit T. V. Williams, as Revenue Commissioner of the State of Georgia and pursuant to Georgia Code Section 92-3213 and 92-3214, did demand on November 21, 1956 that the National Association for the Advancement of Colored People, a Corporation organized under the laws of New York, through its duly authorized agents and employees, produce all books, records, and other data bearing on the said Corporation's income, disbursements and expenses prepared or used by said Corporation in the conduct of its business during the taxable years 1947 through 1955, which said demand was also made on John C. Calhoun, D. W. Hodges, L. D. Milton, Mrs. Eunice Cooper, D. L. Hollowell, and Mrs. Ruby Hurley, officers and agents of said Corporation, and that it was within the power of the said duly authorized officers, agents and employees of the said Corporation to produce the same, but said Corporation and said officers, agents and employees have failed to do so;
>
> IT IS HEREBY ORDERED that the National Association for the Advancement of Colored People, a Corporation organized under the laws of New York, and its duly authorized officers, agents and employees, to-wit: John C. Calhoun, D. W. Hodges, L. D. Milton, Mrs. Eunice Cooper, D. L. Hollowell, and Mrs. Ruby Hurley, produce the said books, records and other data in their individual possession or control instanter for the inspection by T. V. Williams, Revenue Commissioner of Georgia or any of his duly authorized agents.

Counsel for the branch officers thereupon informed the revenue agents that before producing any records he would

have to contact the judge who had signed the order (Br. 158). It was explained to the revenue agents that Calhoun was not refusing to comply with the court's order but that he "was trying to get an understanding about what to do" (Br. 437). When counsel was able, later that afternoon, to meet with the court (Br. 116) he stated, in the words of the court, "that there had been no refusal to comply with the order; that it had been stated by at least some of the respondents [defendants] that before complying with the order [counsel] desired to talk with the judge . . ." (Br. 117; see also Br. 425-426, and Tr. 577-578). The court stated "that counsel for the other side would be down pretty soon to present another paper and we could discuss the whole matter" (Br. 117). When counsel for the Revenue Commissioner arrived, the "paper" to which the court had referred was disclosed to be an application for the issuance of a rule to show cause why the defendants should not be cited for contempt. The rule was issued that afternoon in the following language (Br. 44):

> Let the defendants be served and let them show cause before me at the Courthouse in Fulton County, Georgia, on the *5th* day of December, 1956, at *10* o'clock, *A. M.*, or as soon thereafter as counsel may be heard on said date. Why, they have not complied with said order, and let them then and there show further cause why they should not be attached for contempt in failing to comply with said order. In the meantime and until further order of the Court, the National Association for the Advancement of Colored People, a corporation organized under the laws of New York, its officers, agents and employees, to wit: John C. Calhoun, D. W. Hodges, Mrs. Eunice Cooper, L. D. Melton and D. L. Hollowell, are hereby enjoined from removing all records, books, and other data of said corporation or its affiliates, chapters or branches from their respective premises at 204 Auburn Avenue, N. E., and at 859½ Hunter Street, N. W., or otherwise concealing or disposing thereof.

Prior to hearing on the contempt citation, respondents filed motions to dismiss, stating that the court order which was entered ex parte directing instanter production of the books and records did not grant to the defendants the opportunity for a hearing to offer defenses against the granting of plaintiffs' original petition, and that this order of the judge was a final adjudication which denied due process of law guaranteed by the Fourteenth Amendment to the United States Constitution (Br. 50-63).

The National Association for the Advancement of Colored People, the corporate defendant, filed a response denying that it failed to comply with the order of the court, asserting that the order granting plaintiff's petition was null and void as having been issued without a hearing, that it was unreasonable and arbitrary in that it required the corporate defendant, established and existing under the laws of the State of New York, to produce instanter books and records located in New York. This response also stated that the corporate defendant is not organized for pecuniary gain or profit, but solely for the purpose of promoting civic and social welfare of colored citizens; that it was exempt under Georgia statutes; that it had been adjudicated by the income tax division of the United States Commissioner of Internal Revenue as not subject to federal income tax laws (a copy of said ruling being attached); that prior to institution of the instant action it had received no demand from the state concerning the filing of an income tax application for exemption; that its agent, Mrs. Ruby Hurley, had no possession or control of any records belonging to this defendant which reflect its income and disbursements, and that none of the other defendants had such records; that Mrs. Hurley had made available to the revenue agents the records in her office and they had indicated that they were satisfied with her compliance; and that the proceedings herein denied due process of law guaranteed by the Fourteenth Amendment to the United States Constitution (Br. 64-79).

Defendant, John C. Calhoun also filed a response making similar allegations and asserting that he was not an officer, agent or employee of the corporate defendant and that he had no possession or control of any books, records, papers or other data as an officer, agent or employee of said corporation (Br. 89-90). The other defendants filed similar responses.

After argument, all of the motions to dismiss were overruled, and the court proceeded to hear evidence on the contempt rule.

The evidence disclosed that Calhoun was president of the Atlanta branch, elected by the branch membership (Br. 262); that the Atlanta branch is an unincorporated association of persons in Atlanta, who are members of the New York corporation (Br. 267); that his duties were to supervise the "activities of the Branch in the interim between meetings of the Executive Committee" (Br. 263); that the branch has an office in an office building at 204 Auburn Avenue, N. E., in the said city, which he visited from time to time, sometimes at least once a week, when necessary (Br. 264); that insofar as he knew, there were no corporate records or membership records at the branch office (Br. 284); that when a number of checks or contributions are collected, they are aggregated and sent to the National Office (Br. 279), according to a formula of apportionment (Br. 300); that a donor receives a membership card from New York (Br. 282); that he did not require that any records be kept apart from deposit slips and vouchers; that should a person claim to have not received his membership card, the branch would cause a letter to be written to New York to inquire concerning the matter (Br. 283-284); that the national office formulates programs; and officials of the national office may address the branch (Br. 295); that the national office sends out program recommendations to branches, but these are not necessarily followed by the branches, which can formulate their own (Br. 295); that

policies on which the branch and the national office concur, include:

* * * *

> . . . To promote equality of rights and eradicate caste or race prejudice among the citizens of the United States . . .
>
> * * * *
>
> . . . To advance the interest of colored citizens . . .
>
> . . . And to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law . . . (Br. 309-310);

* * * *

that he was a volunteer, receiving no compensation for his services as President of the Atlanta branch (Br. 311); that he is in the furniture business (Br. 296); and that he explained to the revenue agents that he did not have any records of the New York corporation (Br. 315).

In response to the following question concerning the branch's books, he replied:

> Q. . . . I said, are you willing to produce the records of the Atlanta Branch of the National Association for the Advancement of Colored People showing disbursements and income or other financial records? A. If this Honorable Court rules that the Atlanta Branch records were pursuant to the income and disbursements of the National Association for the Advancement of Colored People, a corporation established in the State of New York, then I would have to comply with his order (Br. 322).

Mrs. Hurley testified that she is the Southeastern Regional Secretary for the National Association for the Advancement of Colored People, not Calhoun, and the corporation's agent (Br. 429); that, while the Association

issues charters permitting use of its name (Br. 431), it does not exercise control over the branches, and she knew of no occasion in which a charter was revoked (Br. 431); that a branch cannot create debts in the name of the corporation (Br. 430); that the local branch does not "pay any of the bills of the national corporation, except for travel expenses, supplies and materials furnished at the branch's request" (Br. 438), nor is the corporation responsible for the branch's finances (Br. 439).

L. D. Milton, the treasurer, testified concerning the relationship of his duties as treasurer of the Atlanta branch to the national office—that "I have no instructions. I have no correspondence. I have no connection at all with the New York office" (Br. 452).[4]

By the Court's judgment and decree of December 14, 1956, only Calhoun and the corporate defendant were found in contempt (Br. 99-109). Calhoun was ordered "committed to the common jail, there to remain in the custody of the sheriff, without bail or mainprise, until he shall cause the said order of the Court to be complied with . . . and that thereafter, and to be computed from the date of his compliance herewith, the said respondent [defendant] John H. (John C.) Calhoun serve 12 months in the common jail, which sentence, however, we now suspend so long as he behaves himself, and in our judgment and discretion" (Br. 107).[5]

The defendant corporation was found "guilty of wilful contempt in the respects above stated as to respondent

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[4] This defendant was ordered to produce certain check-stubs and vouchers, but was not punished (Br. 104). Although he has since complied with this directive, final disposition as to him is pending.

[5] On the same day this defendant was released from custody after approximately three hours, and the revenue agents, accompanied by him, inspected all of the books and records at the office of the Atlanta Branch of the NAACP at 204 Auburn Avenue, N.E.; however, the contempt citation as to him is still pending final disposition.

[defendant] John H. (John C.) Calhoun . . . " (Br. 108). The Court's order recites (Br. 102-103):

> Respondents John H. (John C.) Calhoun, V. W. (D. W.) Hodges, L. D. Milton and Mrs. Eunice Cooper contend that they are not officers, agents or employees of said corporation, but of the Atlanta Branch, National Association for the Advancement of Colored People, which they contend is not a branch office of said corporation, but an autonomous organization of individuals, and that they have never had in their possession or control any books, records or data of said corporation.
>
> But the evidence in the case shows to the contrary. The evidence shows, and the Court holds that said Atlanta Branch is a branch office of said corporation, and that said individuals are corporate agents. Indeed, said corporation registered on June 19, 1956, in the office of the Secretary of State as a foreign corporation, and stated in its registration that its principal office was 20 West 40th Street in the City and State of New York, and that its principal office in Georgia was at 204 Auburn Avenue, Northeast, in the City of Atlanta,[6] which office is that place at which the respondent John H. (John C.) Calhoun, when being confronted with the Court's said order, refused to permit the duly authorized agents of the Revenue Commissioner to inspect the books, records and data which were then and there in said office and in his immediate possession and control.

It was ordered, therefore, that the corporation "produce all its books, records and other data bearing on said corporation's income, disbursements and expenses prepared or used by said corporation in the conduct of its business during said taxable years wherever said business was transacted, whether within or without this state (except

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[6] The said registration also includes the name of Charles E. Price as the corporation's "authorized agent in Georgia" at 204 Auburn Avenue, N.E. (Tr. 614).

such as may be otherwise theretofore produced hereunder) . . . within thirty-five days . . . [and] that said corporation forthwith pay into the registry of the Clerk of this Court a fine of twenty-five thousand dollars, to be hereafter assessed and apportioned remedially and punitively, as shall appear just and appropriate to the Court, the Court reserving jurisdiction, after the production of the books, records and data hereby ordered, to reduce the amount of said fine if such should be just under the circumstances then existing"[7] (Br. 108-109).

On January 14, 1957, Calhoun and the corporate defendant filed a Notice of Intention to Tender a Bill of Exceptions to the Contempt Judgment and Decree of December 14, 1956 (Br. 15).[8] The Georgia statutes governing appeals and the preparation of the record on appeal, are set out in the appendix hereto (App. 45 *et seq.*).

On February 1, 1957 a hearing was held at which the counsel for plaintiffs and defendants sought to determine the correctness of the bill of exceptions and the transcript of the proceedings. The proposed bill of exceptions and the transcript were left with the court and the court returned them, declining to certify them (Tr. 633). Instead, the court directed that the defendants make a number of changes in both (Tr. 632-644). On March 18, 1957 defendants submitted a revised bill of exceptions with a revised

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[7] It should be noted here that agents of the Revenue Commissioner did inspect the financial books and records of the corporate defendant at its office in New York on May 22-23, 1957. (Footnote 6, p. 4, Brief of Defendant in Error on Motion to Dismiss Writ of Error.) However, the contempt adjudication as to this defendant is still pending for final disposition.

[8] On December 21, 1956 these defendants filed a motion to modify the contempt judgment and decree and for issuance of a rule nisi on said motion. The court refused to issue the rule. A Notice of Intention to Tender a Bill of Exceptions to this action was filed on January 21, 1957. However, there was no assignment of error on this matter in the proceedings below.

proposed transcript of the proceedings (Tr. 645). The court retained this bill of exceptions, but on April 15, 1957 the proposed transcript of proceedings was returned with further directions for alterations (Tr. 645-653). The Court's order stated:

> On March 18, 1957 a revised bill of exceptions was handed the Court, together with transcript of the proceedings, from which many pages had been deleted, and copies of documentary evidence, said letter stating as follows:
>
> 'Tendered herewith is a revised bill of exceptions in reference the above-styled case along with proposed transcript of evidence. If the said transcript is approved by you, we shall then have same typed in final form.'
>
> When these documents were handed the Court counsel orally requested that the Court examine said transcript and advise counsel whether if a brief of evidence were made up by typing the undeleted portions of the transcript, same, with the documentary evidence, would be approved as a brief of evidence.
>
> The Court is retaining said revised bill of exceptions and copies of documentary evidence. When the papers in the case have been completed the Court will pass on the correctness of the bill of exceptions. Returned herewith is said transcript handed the Court, which is not a transcript of the evidence alone, but said deleted transcript of the proceedings and which consists of 722 pages prepared by the official Court Reporter, many of the pages being deleted by lines drawn through the pages and portions of other pages being deleted by lines drawn through portions of the pages.
>
> When a brief of evidence is tendered the Court its correctness will be passed upon. From examination of said transcript it appears to the Court that if it is retyped so that the retyped material will include the transcript, less the portions indicated thereon to be deleted, same and said copies of the documentary evidence will constitute a correct brief

> of evidence, provided the following are also done: [At this point the order described contains pages and portions of pages which were required to be added or excised. There then followed a requirement that the brief of evidence contain a conversation which the Court stated it heard conducted by two counsel for petitioners herein although the stenographic transcript contains no such exchange]:
>
> " 'At this point A. T. Walden, leading counsel for respondents stated to said Moore audibly in substance as follows:
>
> 'Tell him we will produce them if he will revoke his order,' following which said Moore answered the Court as follows:
>
> 'No. As to that, I take this position, as to that proposition I say this, that the defendants now would be put in an embarrassing position if the Court did that unless this Court did this, and was prepared to do it now, would be to dissolve that original order because of this fact, that the present order here on the order of citation to show cause for contempt is this. . . .' "

The order went on to recite additional inclusions and deletions which the court would require (Tr. 646-656).

Moreover, the court also required that the entire transcript of proceedings (from which the brief of evidence was abstracted) be sent to the appellate court with the bill of exceptions (Tr. 656); it ruled that filing a brief of evidence would be optional, but that the entire transcript would have to be sent up (Tr. 655-656).

On May 14, 1957 defendants resubmitted the brief of evidence, total transcript of the record, and a statement explaining action taken pursuant to the court's order of April 13, 1957 (Tr. 658-661). This brief of evidence was a wholly, freshly retyped abstract of the testimony, copied, however, from the original transcript, and containing certain of the evidence directed by the court to be included,

and omitting certain of the evidence directed to be excluded. A statement by defendants' counsel, dated June 5, 1957, was submitted with this brief of evidence setting forth their reasons for any noncompliance with the court's demands (Tr. 658-661).

On June 5, 1957 the court attached its certificate to the brief of evidence, and on June 6, 1957 certified the bill of exceptions as follows:

> "I do certify that the foregoing bill of exceptions is true and specifies all the evidence, and specifies all the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted to the Court of Appeals, that the errors alleged to have been committed may be considered and corrected.
>
> "I do further certify that the facts relating to the presentation and certification of this bill of exceptions and the delays incident thereto are as set forth in the following orders of this Court, complete copies of which parts of the record in said case, certified as such, the Clerk of the Superior Court of Fulton County is hereby ordered and directed to transmit to the Court of Appeals with this bill of exceptions, to-wit:
>
> "(a) Order of February 12, 1957 entered on copy of communication addressed to counsel for plaintiffs in error dated February 11, 1957, making said copy a part of the record, said copy and order filed February 12, 1957. Said order and copy of communication are both to be transmitted;
>
> "(b) Order of February 26, 1957 entered on "Request for Clarification," and said "Request for Clarification," both filed February 26, 1957, and both to be transmitted;

"(c) Order of April 14, 1957 entered on copy of communication dated April 13, 1957 to counsel for plaintiffs in error, making said copy a part of the record, said copy and order both filed April 15, 1957, and both to be transmitted;

"And also in the following facts: Said communication of April 13, 1957 refers to documents handed the Court on March 18, 1957 and on March 21, 1957; these two dates refer to but one occasion the correct date of which was March 18, 1957; no documents of any kind were handed the Court on March 21, 1957; the first part of said communication had been prepared before receiving counsel's letter dated April 12, 1957, which is set out in the communication and erroneously states the date as March 21, 1957; in the latter part of the communication the Court made the same error. And also in the following facts: On May 13, 1957 counsel for plaintiffs in error left the message in the Court's office that they would bring documents that afternoon at four o'clock; shortly before that hour counsel called and stated that there was delay but they would come at five o'clock; the Court instructed that counsel be advised the Court was leaving and would receive the documents the following morning, at which time, the morning of May 14, 1957, there were tendered the Court the following documents, to-wit: The transcript of the proceedings in two parts, which has been certified, and the brief of evidence (except documentary evidence), which has been conditionally certified. Also tendered was a statement of counsel as to why they declined to follow the Court's directions as to the brief of evidence in certain particulars. This statement has been made a part of the record by order dated the 5th day of June, 1957, and a copy of the same and of said order certified as such are ordered transmitted by the said Clerk to the Court of Appeals" (Br. 18-20).

The judge certified the brief of evidence as follows:

"I do certify that the foregoing 348 pages constitute a true and correct brief of the evidence (except documentary evidence which is herewith separately

certified), except for the following, each of which was heretofore by communication dated April 13, 1957 made a part of the record by order of April 15, 1957, called to the attention of counsel for respondents in said case, said counsel refusing to comply with the order of said date in respect thereto, to-wit:

"1. The following should be deleted: On Page 4 beginning with the words, 'Mr. Moore: If the defendants had had time', etc., through end of page 10. Also, on Page 57, delete from the words, 'The Court: Do you make any attack on the validity of the regulation?' through the words, 'it is a perfect defense.' These deletions are in conformity with the requirements of Items 1 and 2 on Page 2 of the aforesaid order.

"2. The following should be inserted on Page 2 between the words, 'The Court: Well, suppose the Court accorded you a hearing now and went into the whole matter and concluded that you ought to produce these records. Would you produce them?' and the words, 'Mr. Moore: No. As to that, I take this position,' etc., to wit: At this point A. T. Walden, leading counsel for respondents, stated to said Moore audibly in substance as follows: 'Tell him we will produce them if he will revoke his order,' following which said Moore answered the Court as follows:

"This is in compliance with the first part of Item 12 of Page 3 through the middle of Page 5 of the aforesaid order.

"3. Delete the following: On Page 344 from the words, 'The Court: As a lawyer and officer of the Court,' etc., through the words on Page 345, 'the income and disbursements of the corporation.' This is in compliance with Item 16 of the aforesaid order" (Br. 460-461).

On June 20, 1957 defendants filed an application for the issuance of a writ of mandamus in the Court of Appeals of

Georgia to require the trial court to unconditionally certify the brief of evidence. Among reasons which were advanced therefor was that the trial judge had directed that there be included in the brief of evidence certain statements allegedly made by one of defendants' counsel to associate counsel during the trial which allegedly had been overheard by the court although not taken down by the stenographer, while on the other hand the court directed excluded from the brief of evidence stenographically transcribed statements by counsel and the court concerning actions taken by them in the earlier phases of this case. In this petition for writ of mandamus counsel alleged that the certificate to the bill of exceptions was conditional in that it referred to the brief of evidence as being "conditionally approved." Insofar as the brief of evidence was concerned, the Court of Appeals ruled that:

> A certificate that the facts alleged in a bill of exceptions upon which an appeal is based are not true amounts to a refusal to certify that the bill of exceptions is true. McBurney v. Anderson, 78 Ga. App. 776 (4) 52 S. E. 2d 519. In such circumstances the trial court does not lose jurisdiction to sign a certificate that the bill of exceptions is true, and in a proper case he may be compelled by the appellate court having jurisdiction of the case to so certify (App. 43).

The court further ruled that the trial court was correct in ordering the deletion of all colloquies by the court and counsel and, at the same time, the inclusion of the statement allegedly made by counsel in conference with associate counsel and dismissed the writ.[9] Petitioners then petitioned the Supreme Court of Georgia for a petition for writ of certiorari, which was also denied.[10]

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[9] See *NAACP, et al.* v. *Pye, Judge*, Court of Appeals of Georgia, 96 Ga. App. 685, 101 S. E. 2d 609; rehearing denied November 18, 1957. See App. 42.

[10] Certiorari den., Supreme Court of Georgia, January 11, 1958 (unreported); rehearing denied February 7, 1958 (unreported).

Thereupon petitioners returned to the Superior Court of Fulton County and on the 17th of March, 1958, filed an amendment to the brief of evidence which in all respects complied with the order of the trial judge of April 13, 1957, requiring certain inclusions and deletions in the brief of evidence as follows:

> "Come now NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a corporation, and JOHN CALHOUN, plaintiffs-in-error in the above-styled suit, and having been denied the issuance of a Writ of Mandamus by the Court of Appeals of Georgia, and in compliance with the order of the Honorable Durwood T. Pye, dated April 13, 1957, which order was made a part of the record in this case by the trial court on June 5, 1957, and petitions this Honorable Court to amend the Stenographic Brief of Evidence in said case by incorporating therein, as evidence, and by deleting therefrom the following extracted portions of the hereinbefore referred to order of April 13, 1957:
>
> 1
>
> "Plaintiffs-in-error amend the said Stenographic Brief by deleting Page 4 beginning with the words, 'Mr. Moore: If the defendant had had time,' etc., through the end of page 10. Plaintiffs-in-error further amend by deleting from page 57 from the words, 'The Court: do you make any attack on the validity of the regulations?' through the words, 'It is a perfect defense.' These deletions are in conformity with the requirements of Items 1 & 2 on page 2 of the aforesaid order of April 13, 1957.
>
> "Further amending the said Stenographic Brief, plaintiffs-in-error hereby insert on Page 2, beginning with the words, 'The Court: Well, suppose the Court accorded you a hearing now and went into the whole matter and concluded that you ought to produce these records. Would you produce them?' and the words, 'Mr. Moore: No. As to that, I take this

position,' etc., to-wit: At this point, A. T. Walden, leading counsel for respondents, stated to said Moore audibly in substance as follows: 'Tell him we will produce them if he will revoke his order,' following which the said Moore answered the Court as follows:

"This is in compliance with the first part of Item 12 of page 3, through the middle of page 5 of said order.

"Plaintiff in error amend said Stenographic Brief as follows: Delete on page 344 from the words, 'The Court: As a lawyer and officer of the Court,' etc., through the words on page 345, 'income and disbursements of the corporation.' This is in compliance with Item 16 of the aforesaid order.

"WHEREFORE, Plaintiffs-in-error pray that this amendment to the Stenographic Brief of Evidence be allowed, and by appropriate order to the Clerk of the Superior Court be directed incorporated into said Stenographic Brief of Evidence and transmitted to the Court of Appeals of Georgia as provided by law" (Tr. 663-664).

On March 17, 1958 this amendment was allowed, ordered filed as a part of the record and ordered transmitted to the Court of Appeals of Georgia with the bill of exceptions which had been filed on March 6, 1958 (Tr. 666). The brief of evidence and bill of exceptions were transmitted by the Clerk of the Superior Court to the Court of Appeals and with their certificates constitute the writ of error.[11]

On May 20, 1958 the Revenue Commissioner filed a motion to dismiss the writ of error on the ground, among others, that the certificate to the bill of exceptions was conditional, thereby depriving the Court of Appeals of jurisdiction to hear the case (Tr. 668).

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[11] Georgia Code Annotated (1933) § 6-807 (6146); App. p. 49.

On June 23, 1958 the Court of Appeals, having received briefs and heard arguments from both sides,[12] dismissed the writ of error on the ground that it lacked jurisdiction to entertain the case for the reason that the judge's certificate to the bill of exceptions was conditional and not absolute (Br. 462-473).[13] Rehearing was denied, with an opinion by the court, July 31, 1958 (Br. 474-475).[14]

Petitioners applied to the Supreme Court of Georgia for a writ of certiorari (Tr. C. 1-9) which was denied without opinion on October 15, 1958 (Br. 487). Rehearing was denied November 7, 1958 (Tr. C. 13).

Reasons for Allowance of the Writ

I

Petitioners followed proper Georgia appellate procedure according to any fair reading of the law and where constitutional rights are at stake should be permitted to assert these rights on appeal.

This case therefore reaches this Court in the following posture: The record below, pertinent to a proper understanding of the issues presented, is before this Court and was before the Court below in three different forms.

One, there is the entire Transcript of the Record which contains everything that happened in the trial court and which the trial judge ordered to be sent up. (See Tr. 636.)

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[12] The case was briefed and argued in the Court of Appeals on the merits as well as on the procedural issue; however, in dismissing the writ of error on the procedural ground, the Court did not refer to the merits.

[13] 104 S. E. 2d 923, App. p. 33.

[14] 98 Ga. App. 74, 104 S. E. 2d 923, 927.

Two, there is the Brief of Evidence (Br. 110-459) and the amendment thereto (Tr. 663-664), filed pursuant to order of the court (Tr. 666) following denial of the petition for writ of mandamus. These in combination also present everything which the trial court considered pertinent to a proper consideration of the case.

Three, there is the Brief of Evidence (Br. 110-459) and the certificate to the bill of exceptions designating additional portions of the transcript which, in the trial court's view, should have been added to the Brief of Evidence (Br. 18-20). This third set of documents, considered in combination, also sets forth everything necessary to a proper consideration of the issues as viewed by the trial court.

Notwithstanding these three separate (albeit redundant) modes of setting forth the entire record pertinent to a proper understanding of the issues presented by the case, it was held that petitioners herein did not bring the case up for review on a record adequate to present the issues. If this is true, it is, petitioners respectfully submit, no fault of theirs. For, the many exchanges between the trial judge and petitioners in an effort to settle the record (Tr. 632-661), the petition for mandamus, the amendment to the brief of evidence, and the general tenor of the proceedings, indicate a diligent, protracted effort on petitioners' part to comply with the details of Georgia procedure so that they might bring up for review their solemn constitutional claims.

The Georgia law, as set forth in *W. T. Rawleigh Co.* v. *Forbes,* 202 Ga. 425 (1947), in dealing with the pertinent Georgia statute, § 6-806, which was amended in 1946 for the express purpose of preserving the right to appeal against technical objections, held that:

> . . . we construe this amendment [to the statute] to mean that where the judge's certificate does so devi-

> ate, its language cannot, *merely by implication*, be construed as being a derial of the truth of any part of the contents of the bill of exceptions; but the language of the certificate shall be construed as a verification of the contents of the bill unless it *affirmatively appears* to be a denial of the truth of some part of thereof. (Italics in original.)

As noted by the *Rawleigh* case (202 Ga. at 428), this amendment was one in the drafting of which members of the Supreme Court participated and the interpretation, obviously, is of more than ordinary authoritativeness.

The opinion of the Court of Appeals, whose judgment was denied certiorari, does not mention the *Rawleigh* case, which from the comprehensiveness of its treatment one might well call the leading decision on the subject. Instead the Court of Appeals attempts to distinguish the case now at bar from three others. It wrote, in denying the petition for rehearing:

> . . . Neither did the certificate require to be sent to this court approved parts of the record which were not specified in the bill of exceptions. These facts render inapplicable the ruling in Crumley v. Hall, 202 Ga. 588 (— S. E. —); Harris v. Lumpkin, 136 Ga. 47 (— S. E. —); Scott v. Whipple, 116 Ga. 211 (— S. E. —) (Br. 474).

But even this is not so, for the trial court did require that the *entire* record be sent up, and it was. Moreover, in *Crumley v. Hall*, the trial judge had merely stated that "While the allegations in this bill of exceptions do not accurately state the contents of the petition and amendments thereto, such pleadings will speak for themselves . . . " (202 Ga. at 589). This was deemed an adequate bill. There is no claim that the bill of exceptions before this Court does not "accurately state the contents" of any portion of the record. But, if this were argued it could be replied, as in *Crumley* v. *Hall* that the record "speak[s]

for itself." And all of the record was sent up. As in *Crumley* v. *Hall*, "it cannot be said that the judge's certificate affirmatively shows an intention to modify the truthfulness therein" (202 Ga. at 590).

The holding in the *Rawleigh* case is consonant with the liberalized provisions of Georgia procedure:

> § 6-1304 (6181). Dismissal when ground can be removed.—No writ of error shall be dismissed in the appellate court on any ground whatever which can be removed during the term of the court to which the said writ of error is returnable, and the appellate court shall give such time, during said term, even to the end of the same, as may be necessary to remove said ground, if it can be removed during the said term. (Acts 1880-1, p. 123.)
>
> § 6-1307. The Supreme Court, or the Court of Appeals shall not dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to said courts, where there is enough in the bill of exceptions or transcript of record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein.

The Georgia Court of Appeals nowhere indicated the inapplicability of the *Rawleigh* case, nor the inapplicability of the sections of the Georgia Code cited above. Instead, the case cited the following decisions: *Williams* v. *Smith, Judge*, 93 Ga. App. 429 (2) (91 S. E. 2d 840); *Youmans, Sheriff* v. *Consumers Finance Co.*, 80 Ga. App. 676 (57 S. E. 2d 238); *Jones* v. *Pierce*, 66 Ga. App. 254 (17 S. E. 2d 838).

In the *Williams* case the certificate was certified as "being true in part and untrue in part." (93 Ga. App. at 429.) This makes that holding clearly distinguishable from *Rawleigh* and the case at bar. Similarly in the *Youmans*

case it was held that the certificate showed the bill "to be in part untrue." (80 Ga. App. at 676.) The *Jones* case was decided in 1941 prior to the amending of § 6-806, but it, too, contains an assertion of untruthfulness. The assertion of truthfulness in the bill involved in the instant case is unequivocal. One must strain indeed—contrary to *Rawleigh*—to imply that the truthfulness of the bill has been impugned.

In this state of the Georgia law petitioners believe, with justification, that they had properly presented their constitutional claim. At best, there has been an ambiguity in the Georgia decisions which the State Supreme Court has attempted to reconcile in this case. But petitioners submit that such retroactive clarification should not have deprived them of an opportunity to present their constitutional claims, when the Georgia statutes particularly hold that appeals generally should not be frustrated by formalism of this sort.

In this context, therefore, petitioners assert that this court should examine "whether the asserted nonfederal grounds independently and adequately support the judgment." *Abie State Bank* v. *Bryan*, 282 U. S. 765; and see *Ward* v. *Love County*, 253 U. S. 17. That this is the law was reaffirmed by this Court as recently as *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 454-455.

Moreover, this procedural cul-de-sac which respondents have contrived in an effort to keep petitioners from asserting clear constitutional rights must be seen as of a piece with the ruthless manner in which state procedure was employed from the very inception of this case. The raid, in the company of the press, upon the defendants; the service of a court order within less than an hour of service of the demand for records and income tax returns dating back

seven years; the service of the citation for contempt at the very time that counsel for defendants was consulting with the judge to obtain a clarification or modification of his order; the holding of petitioner corporation in contempt for the alleged refusal of a local branch officer who was not its agent, at the same time that its actual agent was being exonerated; the effort in the appellate courts to avoid a ruling on the merits, contrary to the intendment of Georgia statutes; all lead to the inexorable conclusion that respondents have been employing procedure for the purpose of penalizing and heavily damaging petitioners for their well known activities. This Court, it is respectfully submitted, should not close its eyes, *Child Labor Tax Case*, 259 U. S. 20, 37, to the pattern—of which this case is a part— exemplified by *NAACP* v. *Alabama*, 357 U. S. 449, now pending as Nos. 753 and 674 Misc.; *NAACP* v. *Patty*, 159 F. Supp. 503, sub nom *Harrison* v. *NAACP*, now pending as No. 127, October Term, 1958; *Bates, et al.* v. *City of Little Rock, et al.*, now pending as No. 770, October Term, 1958; *NAACP* v. *Arkansas ex rel. Bruce Bennett*, now pending as No. 772, October Term, 1958; *NAACP* v. *Bennett*, now pending as No. 757, October Term, 1958, and other proceedings which need not be cited, see Robison, Protection of Associations From Compulsory Disclosure of Membership, 58 Colum. L. Rev. 614 (1958); McKay, With All Deliberate Speed, 43 Va. L. Rev. 1205, 1235-42 (1957); McKay, The Repression of Civil Rights As An Aftermath of the School Segregation Decisions, 4 How. L. Rev. 9 (1958).

Petitioners respectfully submit that the procedure which they followed was adequate to present the constitutional claim and that this Court, therefore, may proceed to a consideration of the merits.

II

Under the facts of this case to have found petitioners in contempt denied due process of law conferred by the Fourteenth Amendment.

But for the Georgia appellate procedural morass in which petitioners have become mired, this case, on the record now before this Court, presents substantial questions of federal constitutional rights which were decided by the trial court—and, although presented to the Court of Appeals were not decided by it—in a manner inconsistent with applicable decisions of this Court.

The original order of the trial court, the alleged disobedience of which led to the contempt adjudications here sought to be reviewed, was an "instanter" order, issued ex parte, requiring instant, forthwith and immediate production and inspection of petitioners' books and records (Br. 38). Thus, the order of the court was in effect and operation a final judgment, adjudicating the legal rights of petitioners, without reasonable notice and opportunity for a hearing to assert any defenses or objections they might have to the production and inspection of their books and records. Such procedures and proceeding as enforced against petitioners clearly and unmistakably are in conflict with "due process" concepts as interpreted by this Court. See *Roller* v. *Holley*, 176 U. S. 398; *Hovey* v. *Elliott*, 167 U. S. 409. Cf. *Consolidated Rendering Co.* v. *State of Vermont*, 207 U. S. 541.

The trial court's determination that petitioners were in "wilful disobedience" of its order for production and inspection of books and records (Br. 107, 108) offends the sense of justice and fundamental fairness which is safeguarded by the due process clause of the Fourteenth

Amendment. See *Rochin* v. *California*, 342 U. S. 163. The record in this case disclosed that there was no actual refusal by petitioner Calhoun to comply with the order of the court insofar as it was possible for him to do so (Br. 117, 425-426, 437). The facts show either inability to comply or uncertainty concerning his legal obligation, which he sought to correct by immediately securing counsel who promptly sought and obtained a conference with the trial court to ascertain petitioners' rights and obligations in the premises (Tr. 577-578). It was during this short period and while seeking such clarification that the alleged contempt was consummated. Since the contempt proceedings herein were both criminal and civil, the criminal aspect dominates and the attendant proof standards should have been met. *Union Tool Co.* v. *Wilson*, 259 U. S. 107. At the very least there was no proof beyond a reasonable doubt. See *Quinn* v. *United States*, 349 U. S. 155; *Watkins* v. *United States*, 354 U. S. 178; *Flaxer* v. *United States*, -- U. S. —, 3 L. ed. 2d 183.

The order of the trial court is arbitrary, unreasonable and unlawful, insofar as it directs the New York corporate petitioner to produce all of its books and records and other data bearing upon its income, disbursements and expenses, whether of business transacted in the State of Georgia or elsewhere, for inspection of the Revenue Commissioner, at the alleged branch office of the corporation in Atlanta, Georgia. That such imperative and unlimited order would necessarily result in an unreasonable and arbitrary interference with the rightful conduct and operation of the widespread business of the corporate petitioner is plain and clear. The legal principles and authorities here pertinent, including decisions by this Court, were recently discussed in *Schwimmer* v. *United States*, 232 F. 2d 855, 861-862, cert. denied 352 U. S. 833.

Finally, it is submitted that the judgment and sentence of the Court are excessive, cruel and unusual. See *United States* v. *United Mine Workers*, 350 U. S. 258, 303, 304. Cf. *NAACP* v. *Alabama*, *supra*. In the instant case the court imposed upon the corporate petitioner a fine of twenty-five thousand dollars, stating that the same would be apportioned between the criminal and remedial, depending upon the amount of the expense incurred by respondent in his investigation into the fiscal affairs of petitioner. In this connection, it should be noted that the maximum fine for criminal contempt under Georgia law is $200.00. Therefore, by irrefutable inference it must be determined that of the twenty-five thousand dollars fine, at least twenty-four thousand eight hundred dollars was imposed in contemplation of the remedial aspects of the case, i.e., to indemnify respondent. The evidence totally fails to show any injury or damage sustained, or likely to be sustained, by respondent in the performance of his duties in the premises. It is incredible that the costs could even approximate twenty-four thousand eight hundred dollars. Such deficiency, vagueness, and palpable excess render the fine insupportable in law, excessive and unusual in fact, and a deprivation of petitioner's property without due process of law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

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Appendix

Opinions Below

NAACP, Inc., *et al.*

v.

T. V. Williams, Revenue Commissioner.

Court of Appeals of Georgia, June 23, 1958,
98 Ga. App. 74, 104 S. E. 2d 923.

Felton, Chief Judge.

This is an appeal by the National Association for the Advancement of Colored People, and J. H. Calhoun, the President of the Atlanta Branch of said association, from an order and judgment adjudging defendants in contempt for the violation of an order of court requiring the production of records for inspection by the Revenue Commissioner of Georgia for income tax purposes.

1. The motion to dismiss the writ of error on the ground that the bill of exceptions was not tendered in time is without merit for the reason that the trial judge certified as true a recital in the bill of exceptions that the bill of exceptions was presented within thirty days from the date of the judgment complained of.

2. The motion to dismiss the writ of error on the ground that the brief of evidence was not unconditionally approved is without merit for the reason that such a fact is not a ground of dismissal of the writ of error.

3. The motion to dismiss the writ of error on the ground that the certificate to the bill of exceptions is conditional, is meritorious and is granted.

[*Identical Bill*]

The bill of exceptions in this case is the identical one which was before this court in the matter of the plaintiffs in error's petition for mandamus, National Association for the Advancement of Colored People et al. v. Pye, Judge, 96 Ga. App. 685 (S. E.), including the certificate in question. No effort was made to correct the brief of evidence as required and no new certificate was presented to or signed by the judge unconditionally certifying that the bill of exceptions contained all the evidence and specified all of the record necessary to an understanding of the errors complained of. The judge's certificate, in full, is as follows:

> "I do certify that the foregoing bill of exceptions is true and specifies all the evidence, and specifies all the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Fulton County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such and cause the same to be transmitted to the Court of Appeals, that the errors alleged to have been committed may be considered and corrected.
>
> "I do further certify that the facts relating to the presentation and certification of this bill of exceptions and the delays incident thereto are as set forth in the following orders of this Court, complete copies of which parts of the record in said case, certified as such, the Clerk of the Superior Court of Fulton

County is hereby ordered and directed to transmit to the Court of Appeals with this bill of exceptions, to-wit: (a) Order of February 12, 1957 entered on copy of communication addressed to counsel for plaintiffs in error dated February 11, 1957, making said copy a part of the record, said copy and order filed February 12, 1957. Said order and copy of communication are both to be transmitted (b) Order of February 26, 1957 entered on 'Request for Clarification,' and said 'Request for Clarification,' both filed February 26, 1957, and both to be transmitted; (c) Order of April 15, 1957 entered on copy of communication dated April 13, 1957 to counsel for plaintiffs in error, making said copy a part of the record, said copy and order both filed April 15, 1957, and both to be transmitted; And also in the following facts: Said communication of April 13, 1957 refers to documents handed the Court on March 18, 1957 and on March 21, 1957; these two dates refer to but one occasion the correct date of which was March 18, 1957; no documents of any kind were handed the Court on March 21, 1957; the first part of said communication had been prepared before receiving counsel's letter dated April 12, 1957, which is set out in the communication and erroneously states the date as March 21, 1957; in the latter part of the communication the Court made the same error. And also in the following facts: On May 13, 1957 counsel for plaintiffs in error left the message in the Court's office that they would bring documents that afternoon at four o'clock; shortly before that hour counsel called and stated there was delay but they would come at five o'clock; the Court instructed that counsel be advised the Court was leaving and would receive the documents the following morning, at which

time, the morning of May 14, 1957, there were tendered the Court the following documents, to-wit: The transcript of the proceedings in two parts, which has been certified, and the brief of evidence (except documentary evidence), which has been conditionally certified. Also tendered was a statement of counsel as to why they declined to follow the Court's directions as to the brief of evidence in certain particulars.

This statement has been made a part of the record by order dated the 5th day of June, 1957, and a copy of the same and of said order certified as such are ordered transmitted by said Clerk to the Court of Appeals.

"This 6th day of June, 1957.

"/s/ Durwood Pye
Judge, Superior Court,
Atlanta Judicial Circuit"

"Addition by Court

"By Item 7 of the record there is referred to the transcript of the proceedings in two parts—Part 1 and Part 2, with separate orders of the Court approving each part dated June 5th, 1957.

"By Item 8 of the record there is referred to the brief of the evidence (except documentary evidence) with the conditional approval of the Court thereon dated June 5th, 1957, and the separate documentary evidence, with the approval of the Court thereon dated June 5th, 1957.

"/s/ Durwood Pye
Judge, Superior Court, A.J.C."

[*Certificate of Evidence*]

The certificate to the brief of evidence is as follows:

"I do certify that the foregoing 348 pages constitute a true and correct brief of the evidence (except documentary evidence which is herewith separately certified), except for the following, each of which was heretofore by communication dated April 13, 1957 made a part of the record by order of April 15, 1957, called to the attention of counsel for the respondents in said case, said counsel refusing to comply with the order of said date in respect thereto, to-wit: 1. The following should be deleted: On Page 4 beginning with the words, 'Mr. Moore: If the defendants had had time', etc., through end of Page 10. Also, on Page 57, delete from the words, 'The Court: Do you make any attack on the validity of the regulation?' through the words, 'it is a perfect defense.' These deletions are in conformity with the requirements of Items 1 and 2 on Page 2 of the aforesaid order. 2. The following should be inserted on Page 2 between the words, 'The Court: Well, suppose the Court accorded you a hearing now and went into the whole matter and concluded that you ought to produce these records. Would you produce them?' and the words, 'Mr. Moore: No. As to that, I take this position,' etc., to-wit: At this point A. T. Walden, leading counsel for respondents, stated to said Moore audibly in substance as follows: 'Tell him we will produce them if he will revoke his order,' following which said Moore answered the Court as follows: This is in compliance with the first part of Item 12 of Page 3 through the middle of Page 5 of the aforesaid order.

3. Delete the following: On Page 344 from the words, 'The Court: As a lawyer and officer of the Court,' etc., through the words on Page 345, 'the income and disbursements of the corporation.' This is in compliance with Item 16 of the aforesaid order.

"This 5th day of June, 1957.

"Durwood T. Pye
Judge, Superior Court, A.J.C."

The first part of the judge's certificate that the bill of exceptions was true and specified all the evidence and record material is contradicted by the later statement that the brief of evidence specified was conditionally approved. Such a certificate is not an unqualified certificate that the bill of exceptions specifies all of the record and evidence required. Such a conclusion is implicit, at least, in our ruling on the petition for mandamus. We now expressly so rule. This conclusion is in perfect accord with the contentions of plaintiffs in error in their petition for mandamus. Paragraph five of the petition for mandamus alleged:

> "That on the 14th day of January, 1957, petitioners tendered their bill of exceptions to the Honorable Durwood T. Pye; that after numerous correspondence and communications between Court and counsel for petitioners herein, as well as hearings, for the purpose of perfecting the Bill of Exceptions, said judge, did on June 6, 1957, fail and refuse to sign a legal and valid certificate upon the Bill of Exceptions in that said certificate, as signed, is not unqualified; for the reason that the judge's certificate attached to the Bill of Exceptions notes that, '* * * the brief of evidence * * * has been conditionally certified'. Also, the Court in his certificate of June

5, 1957 on the stenographic transcript of the brief of evidence recites, in part, that, 'I do certify that the foregoing 348 pages constitute a true and correct brief of the evidence (except documentary evidence which is herewith separately certified), except for the following, each of which was heretofore by communication dated April 13, 1957, made a part of the record by order of April 15, 1957, called to the attention of counsel for respondents in said case, said counsel refusing to comply with the order of said date in respect thereto * * *.' A copy of said communication dated April 13, 1957 and made a part of the record by order of April 15, 1957, is attached as Exhibit 'B' and made a part hereof by reference. Also attached as Exhibit 'C' and incorporated herein by reference, is a copy of the respondents' reply to said communication of April 13, 1957, said reply being dated May 14, 1957."

[*Duty of Judge*]

Paragraph ten of the petition for mandamus alleged: "Your petitioners are advised that it was the official duty of said Judge to certify their Bill of Exceptions as tendered, without modifications, additions, and deletions therein set out by him; that he committed error in refusing to certify same as tendered and that his refusal to certify said tendered bill of exceptions without the modifications described in his certificate rendered his said certification thereof conditional, thus depriving this court of jurisdiction to review the judgment rendered in said case." The proper and necessary procedure in the matter would have been for plaintiffs in error to correct the brief of evidence by including therein the matter directed by the judge to be included and to delete the matter ordered deleted by

the judge and to have the corrected brief approved by the judge unconditionally; and the bill of exceptions should have been corrected as directed by the judge and as corrected should have been presentd to the judge whose duty it would have been to sign an unconditional and unqualified certificate to the effect that it specified all of the evidence and record necessary to a clear understanding of the errors complained of. Instead of following the above procedure the plaintiffs in error filed the same bill of exceptions, as aforesaid, which, being qualified as stated, under the plain and distinct decisions of the courts of this state amounted to no bill of exceptions at all. A bill of exceptions certified as this one is not certified as required by law and the reference in the purported certificate to insufficiencies of the facts alleged in the bill of exceptions is no more than notice to the party of such defects. Williams v. Smith, Judge, 93 Ga. App. 429 (2) (— S. E. —); Youmans, Sheriff, v. Consumers Finance Co., 80 Ga. App. 676 (— S. E. —); Jones v. Pierce, 66 Ga. App. 254 (— S. E. —), and citations.

Under the foregoing authorities the only recourse this court has is to dismiss the writ of error for the reasons above stated which show that this court is without jurisdiction of the case.

Writ of error dismissed. Quillian and Nichols, JJ., concur.

On Motion for a Rehearing

The certificate in this case did not attempt to make all corrections necessary in the brief of evidence by inserting them in the certificate or by reference to an approved part of the record, assuming even that such a thing could be done under decisions cited in the opinion, but indicated some deficiencies by mere reference to a conditionally approved brief of the evidence and the facts of this case

do not bring it within the rule that this court can treat as surplusage the additional matter added by the trial judge to his purported certificate. Neither did the certificate require to be sent to this court approved parts of the record which were not specified in the bill of exceptions. These facts render inapplicable the rulings in Crumley v. Hall, 202 Ga. 588 (— S. E. —); Harris v. Lumpkin, 136 Ga. 47 (— S. E. —); Scott v. Whipple, 116 Ga. 211 (— S. E. —).

Moreover, in order for this court to consider the merits of plaintiffs' petition for mandamus, 96 Ga. App. 685, *supra*, this court necessarily was required to find, in accordance with plaintiffs' contentions, that the bill of exceptions was conditionally certified, for the reason that if the certificate had been unconditional the trial court was without jurisdiction to sign another certificate and the case would have been filable in this court on the unconditional certificate already signed. The plaintiffs have now reversed the position which they solemnly took in judicio, and under which they prevailed in obtaining a ruling on the merits of their petition for mandamus and they are now estopped to contend that the present certificate is unconditional. Bennett, Admx. v. Bennett, 210 Ga. 721 (— S. E. —) and cases cited; Ga. Code Ann. § 38-114, catchword "Position".

Motion for a rehearing denied.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

v.

PYE, Judge.

COURT OF APPEALS OF GEORGIA, OCTOBER 10, 1957,
96 GA. APP. 685, 101 S. E. 2d 609.

[SYLLABUS BY THE COURT]

When this court has under consideration a petition for mandamus, its first duty is to determine whether such petition states a legal cause for the issuance of the writ. If it does not, as here, it becomes the duty of the court to decline to issue the writ and to dismiss the petition.

PER CURIAM

This is an application for rule nisi brought by the respondents in a contempt proceeding to compel the trial judge to certify the bill of exceptions presented by them to him in appealing from a judgment finding them guilty of contempt. The petition, in proper form, prays for this court to issue a rule nisi requiring the trial judge to show cause why he should not sign the bill of exceptions. The cause of the petitioners is predicated on the right of an appellant to compel the trial judge to certify, without qualification, a true bill of exceptions. The specific contention is that the trial judge in certifying the bill of exceptions ordered certain statements of counsel deleted from the brief of evidence and

required another statement made by counsel inserted in the brief of evidence.

A certificate that the facts alleged in a bill of exceptions upon which an appeal is based are not true amounts to a refusal to certify that the bill of exceptions is true. McBurney v. Anderson, 78 Ga. App. 776 (4) 52 S. E. 2d 519. In such circumstances the trial court does not lose jurisdiction to sign a certificate that the bill of exceptions is true, and in a proper case he may be compelled by the appellate court having jurisdiction of the case to so certify.

[*Matter Deleted*]

It appears from a careful perusal of the facts alleged in the petition that the matters which the trial court ordered deleted from the brief of evidence consisted of colloquies between the court and counsel for the petitioners which were not evidence in the case and not, under Code § 6-801, properly included in the brief of evidence. Assuming but not deciding that some of the statements of the petitioners, counsel, if offered in the form of sworn testimony, might have been admissible and of some evidential value, this did not serve to change their nature from mere observations of counsel to that of competent evidence.

[*Client Bound*]

It is well settled that clients are bound by statements of their attorneys made in open court. While it is true that declarations of an attorney as to the mental attitude of his client are not binding on the client unless made in his presence (Farrar v. Brackett, 86 Ga. 463, 466, 12 S. E. 686), when a statement that the client will refuse to abide the order of the court is made by counsel in open court, and is not denied by the client, it becomes the statement of the client. Tolbert v. State, 12 Ga. App. 685, 686 (9), 78 S. E. 131. In this case both of the respondents, petitioners here,

were present. One, an individual, was physically present, the other a corporation was represented by its officers and attorneys. Where such statements are in the nature of admissions, they are evidence against the client and are properly incorporated in the brief of evidence. Central of Ga. Ry. Co. v. Johnston, 106 Ga. 130 (1) 32 S. E. 78. The case being tried was a contempt proceeding. Vital to the determination of the respondents' guilt or innocence of the contempt of the superior court, was their disposition to obey or defy the court's previous order. The statement of counsel which the court ordered included in the record was made in open court, in the presence of the trial judge, hence was in effect addressed to him. It was a clear declaration that the defendants would not unconditionally abide the judge's previous order. It was material evidence concerning the principal issue in the case. The brief of evidence would have been incomplete without the statement. It was the duty of the trial judge to see that the brief of evidence was complete, and he properly ordered the statement inserted in the brief of evidence. Code (Ann.) § 6-801. It should be observed in reading the preceding headnotes that there is a vast difference between statements made by counsel in colloquies with the court which in their nature are self-serving declarations and admissions of attorneys imputable to their clients.

Having determined that the trial judge was, as disclosed by the record, correct in his ruling as to the matter that should be included and excluded from the brief of evidence, we are constrained to hold that the petition for mandamus nisi shows no right to have the writ issued. The writ is denied and the petition dismissed.

All the Judges concur.

Statutes Involved

Code of Georgia (1933) as Amended

PART II. TAKING CASES TO SUPREME COURT OR COURT OF APPEALS.

6-701. (6138; 1096 P. C.) Causes pending in lower court; finality of judgments; mandamus and quo warranto cases.—No cause shall be carried to the Supreme Court or Court of Appeals upon any bill of exceptions while the same is pending in the court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause or final as to some material party thereto, or unless the judgment is one sustaining, overruling, or dismissing a plea to the jurisdiction, or a plea of res judicata, or one sustaining or overruling a general demurrer to a caveat to the probate of a will, which would necessarily be controlling as to the final disposition of the cause, and should the case at its final determination be carried by writ of error to the Supreme Court or Court of Appeals by either party, error may be assigned upon any antecedent ruling and a reversal and a new trial may be allowed thereon, when it shall be manifest that such erroneous decision of the court has or may have affected the final result of the case, irrespective of the time elapsing between the date of such antecedent ruling and the presentation of the final bill of exceptions. Where bill of exceptions is permissible, all judgments, rulings, or orders rendered in the case which are assigned as error, and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of such judgment, ruling or

order standing alone, and without regard to whether the judgment, ruling or order excepted to was final, or was subject to review by some other express provision of law contained in this section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory, but the appellate court shall in all cases review all judgments, rulings, or orders excepted to which may affect the proceedings below, and which were rendered subsequent to the first judgment, ruling or order held erroneous. Nothing in this paragraph shall require the appellate court to pass upon questions which are rendered moot. No bill of exceptions as to any ruling or decision in a mandamus or quo warranto proceeding or in a case involving a writ of prohibition may be taken to the Supreme Court by a bill of exceptions and writ of error until there has been a final judgment in the trial court. The overruling of a general demurrer in any of these cases shall not be deemed a final judgment subject to review; but the grant of a new trial shall be treated as a final judgment in these cases and subject to review as in other cases. (Acts 1890-1, p. 82; 1946, pp. 726, 730; 1953, Nov. Sess., pp. 440, 455; 1957, pp. 224, 230.)

6-801. (6140; 1098 P. C.) Mode of taking cases to Supreme Court or Court of Appeals by bill of exceptions.—Cases shall be taken to the Supreme Court or the Court of Appeals by bill of exceptions only in the following manner: (Acts 1889, p. 114; 1953, Nov. Sess., pp. 440, 447.)

1. If the case is not one in which a judgment on a motion for new trial is to be reviewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, and shall incorporate in the bill of excep-

tions a brief of such of the written and oral evidence as is material to a clear understanding of the errors complained of, or a stenographic report of the trial of the case, with immaterial questions and answers and parts thereof stricken, and copies of a summary of documentary evidence introduced at the trial, and shall specify therein such portions of the record as are material to such understanding.

2. If none of the evidence is material to elucidate the errors complained of, this fact shall be stated and the evidence omitted.

3. The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of.

4. The judge shall require the clerk to send up only so much of the record as he may certify is material, except as hereinafter provided.

6-802. (6141, 6143; 1098 P. C.) Evidence in record instead of bill of exceptions. Approval of brief of evidence only after notice.—If the plaintiff in error shall so elect, he may have the brief of so much of the evidence as is necessary to a clear understanding of the errors complained of approved by the judge and made a part of the record and sent up by the clerk as a part thereof, rather than have the same incorporated in the bill of exceptions. If the plaintiff in error shall so elect, he may have the stenographic report of the trial of the case, with immaterial questions and answers and parts thereof stricken, and copies or a summary of documentary evidence introduced at the trial approved by the judge and made a part of the record and sent up by the clerk as a part thereof, rather than have the same in-

corporated in the bill of exceptions. No such brief of the evidence shall be approved by the judge unless the opposite party or his attorney of record shall have been given written notice as provided by section 24-3364. (Acts 1882-3, p. 107; 1889, p. 114; 1892, p. 113; 1946, pp. 726, 732; 1953, Nov. Sess., pp. 440, 448.)

6-803. (6142) Evidence on exception to grant or refusal of a new trial.—When a party shall desire to review the judgment of the court in granting or refusing a new trial, the plaintiff in error shall specifically set out the errors complained of, and shall specify only so much of the brief of evidence and such other parts of the record as are material to a clear understanding of the errors complained of, or he may specify the entire transcript of the record on the trial of the case, with immaterial questions and answers and parts thereof stricken. The judge to whom such bill of exceptions is tendered shall, by any needful alteration, cause the same to conform to the truth and to refer to so much of the evidence and such other parts of the record as are material to a clear understanding of the errors complained of; and he shall cause the clerk to send up only so much of the evidence and other parts of the record as he may certify are material, or he may specify the stenographic report of the trial of the case, with immaterial questions and answers and parts thereof stricken, and copies or a summary of documentary evidence introduced at the trial. (Acts 1889, p. 114; 1953, Nov. Sess., pp. 440, 449.)

6-803.1. Assignment of error on final judgment where brief of evidence not required on motion for new trial.—In all cases wherein a brief of the evidence shall not be required under section 70-501.1, no assignment of error need be made upon the final judgment of the court rendered in

said case upon the motion for new trial but the plaintiff in error shall recite in his bill of exceptions that such final judgment was entered. (Acts 1947, pp. 298, 299.)

6-806. (6145; 1099 P. C.) Form of certificate; duty of judge before signing; effect of signing.—The form of the certificate of the judge to the bill of exceptions shall be as follows: "I do certify that the foregoing bill of exceptions is true, and contains (or specifies, as the case may be) all the evidence, and specifies all of the record, material to a clear understanding of the errors complained of; and the clerk of the ..... court of ..... is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court (or the Court of Appeals, as the case may be), that the errors alleged to have been committed may be considered and corrected." It shall be the duty of the judge, to whom any bill of exceptions shall be presented, to see that the certificate is in legal form before signing the same. Whenever a judge shall attach his signature to a certificate where the language of the certificate is such as to indicate the intention of the judge to verify the truthfulness of the recitals therein contained, his signature shall be construed as a verification of the bill of exceptions and the contents thereof unless by note thereto or modification thereof over his signature the contrary affirmatively appears. (Acts 1889, p. 114; 1946, pp. 726, 732.)

6-807. (6146) Writ of error, what constitutes.—The certificate of the judge to the bill of exceptions shall be the writ of error. (Acts 1855-6, pp. 199, 200.)

6-808. (6147) Judge responsible for legal form of certificate.—It shall be the duty of the judge, to whom any bill of exceptions shall be presented, to see that the certificate is in legal form before signing the same; and no failure of any judge to discharge his duty in this respect shall prejudice the rights of the parties by dismissal or otherwise. (Acts 1893, p. 52.)

6-813. Use of stenographic report with immaterial questions and answers deleted and summary of documentary evidence in lieu of brief of evidence.—In all cases or situations in which a brief of evidence is now permitted or required under the laws of this State, it shall be deemed a compliance with such permission or requirement that a stenographic report of the trial of the case, with immaterial questions and answers and parts thereof stricken, and copies or a summary of documentary evidence introduced at the trial be supplied or used. (Acts 1953, Nov. Sess., pp. 440, 450.)

6-901. (6139; 1097 P. C.) Right to take exceptions; contents of bills of exceptions; cross-bills.—Either party in any civil cause, and the defendant in any criminal proceeding, in the superior or city courts, may except to any sentence, judgment, or decision, or decree of such court, or of the judge thereof in any matter heard at chambers. Such bill of exceptions shall specify plainly the decision complained of and the alleged error, and shall be signed by the party or his attorney. When the successful party to any cause tried in any of the superior or city courts, which is carried to the Supreme Court or the Court of Appeals, shall file a cross-bill of exceptions complaining of errors in rulings made upon the trial adverse to him, it shall be the duty of the appellate court to hear argument upon such cross-bill of exceptions, and to decide the questions therein made, if a reversal of the judgment of the court below shall be ordered,

or if the effect of the affirmance shall be to leave the case to be again tried in the court below. Motions for new trial and for judgment notwithstanding the verdict, and assignments of error in the bill of exceptions need not set out therein portions of record or transcript of evidence, nor shall it be necessary that the grounds thereof be complete in themselves, but shall point out such parts of the record or brief of the evidence by page number as are necessary to an understanding of the error complained of. Where, in preparing the record for transmission to the appellate court, the paging of the record is changed as required by section 6-1001, parties in their briefs shall point out the page numbers of the record where pages of the brief of evidence or other portions of the record pointed out in the assignment of error may be found. (Acts 1880-1, p. 123; 1887, p. 41; 1957, pp. 224, 232.)

6-909. (6158) Objections by judge; certification after removal of objections; notice of tender of exceptions; reviewability of judge's action.—If the judge shall determine that the bill of exceptions is not true, or does not contain all the necessary facts, he shall return the same, within 10 days, to the party or his attorney, with his objections to the same in writing. If those objections shall be met and removed, the judge may then certify, specifying in his certificate the cause of the delay. The judge shall order notice to the opposite party of the fact and time of tendering the exceptions and may hear evidence as to the truth thereof. The action or non-action of the trial judge as to requiring notice under this section and section 6-908.1, shall not be reviewable. (Acts 1946, pp. 726, 739.)

6-910. (6159) Proceedings to compel certification by judge.—If from any cause the bill of exceptions shall not be certified by the judge, without fault of the party tendering, such party or his attorney may, by petition, apply to

the Supreme Court or the Court of Appeals, as the case may be, for a mandamus nisi, directed to such judge. (Act 1845, Cobb, 450.)

1. Such petition shall set out substantially the bill of exceptions tendered, and shall be verified by the attorney as to the truth of the bill as tendered, and by the party or his attorney as to the other facts stated therein.

2. The mandamus nisi shall be served by some sheriff, and his return made to the clerk of the appellate court. It shall be returnable at same term of the appellate court, at which term the court shall consider and determine the validity of the reasons given by the judge for his failure or refusal; but in no case shall a traverse as to the truth of such return of the judge be allowed.

3. If the reasons shall be insufficient, or the judge shall fail or refuse to make any return to the mandamus nisi, the appellate court shall issue a mandamus absolute, commanding the judge to sign and certify the bill of exceptions.

4. If the judge still refuses so to do, the cause shall be heard by the appellate court on the exceptions as verified in the petition for mandamus.

6-1303. (6180) Want of date to signature.—No writ of error shall be dismissed in the appellate court because the clerk, sheriff, judge, or attorney at law shall have failed to affix a date to any official signature, unless it is affirmatively made to appear by affidavit or other proof, in the appellate court, that such official signature was made after the time required by law. (Acts 1880-1, p. 123.)

6-1304. (6181) Dismissal when ground can be removed.—No writ of error shall be dismissed in the appellate court on any ground whatever which can be removed during the term of the court to which the said writ of error is return-

able, and the appellate court shall give such time, during said term, even to the end of the same, as may be necessary to remove said ground, if it can be removed during the said term. (Acts 1880-1, p. 123.)

6-1306. (6182) Dismissal of case as penalty.—No rule of the Supreme Court or the Court of Appeals shall have the effect to dismiss any case, as a penalty upon counsel or client, for noncompliance with any rule or rules of such courts where there has been a substantial compliance with the laws prescribing the method of bringing cases to said courts; but the penalty for a violation of the rules shall be as for a contempt under the provisions of this Code. (Acts 1870, p. 47.)

6-1307. (6183) Technical defects.—The Supreme Court, or the Court of Appeals shall not dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to said courts, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein. (Acts 1893, p. 52.)

6-1309. (6184) Dismissal avoided by amendment.—No writ of error shall be dismissed in the appellate court when, by amendment to the bill of exceptions any imperfection or omission of necessary and proper allegations could be corrected from the record in the case. (Acts 1880-1, p. 123.)

6-1401. (6188) Bill of exceptions amendable to conform to record.—The bill of exceptions may be amended in the appellate court so as to conform to the record in the cause. (Act 1850, Cobb, 455; Acts 1851-2, p. 215.)